

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANK IRWINE,

No. 2:20-cv-0420 AC P

Plaintiff,

v.

GAVIN NEWSOM, et al.,

Defendant.

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. Application to Proceed In Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). ECF Nos. 2, 5. Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account.

These payments will be forwarded by the appropriate agency to the Clerk of the Court each time

1 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.  
2 § 1915(b)(2).

3       II.     Statutory Screening of Prisoner Complaints

4       The court is required to screen complaints brought by prisoners seeking relief against a  
5 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
6 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
7 “frivolous, malicious, or fail[] to state a claim upon which relief may be granted,” or that “seek[]  
8 monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b).

9       A claim “is [legally] frivolous where it lacks an arguable basis either in law or in fact.”  
10 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
11 Cir. 1984). “[A] judge may dismiss . . . claims which are ‘based on indisputably meritless legal  
12 theories’ or whose ‘factual contentions are clearly baseless.’” Jackson v. Arizona, 885 F.2d 639,  
13 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as  
14 stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The critical inquiry is whether a  
15 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis.  
16 Franklin, 745 F.2d at 1227-28 (citations omitted).

17       “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the  
18 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of  
19 what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550  
20 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
21 “Failure to state a claim under § 1915A incorporates the familiar standard applied in the context  
22 of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).” Wilhelm v. Rotman,  
23 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure  
24 to state a claim, a complaint must contain more than “a formulaic recitation of the elements of a  
25 cause of action;” it must contain factual allegations sufficient “to raise a right to relief above the  
26 speculative level.” Twombly, 550 U.S. at 555 (citations omitted). “[T]he pleading must contain  
27 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally  
28 cognizable right of action.” Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur

1 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

2 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
3 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting  
4 Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
5 content that allows the court to draw the reasonable inference that the defendant is liable for the  
6 misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this  
7 standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg.  
8 Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976) (citation omitted), as well as construe the  
9 pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor,  
10 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

11 III. Complaint

12 The complaint alleges that various defendants have been violating plaintiff’s rights under  
13 the Eighth and Fourteenth Amendments. ECF No. 1. Specifically, plaintiff alleges that the water  
14 he is being provided with is contaminated, posing a risk to his health, and that defendants have  
15 failed to issue any kind of notification about the contamination. Id. at 1-16. Plaintiff further  
16 states that none of his claims have been exhausted because he is not required to exhaust  
17 administrative remedies under the California Whistleblower’s Act. Id. at 6, 12, 14.

18 IV. Failure to Exhaust

19 Because plaintiff is a prisoner suing over the conditions of his confinement, his claims are  
20 subject to the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). Under the PLRA,  
21 “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or  
22 any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until  
23 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a); Porter v.  
24 Nussle, 534 U.S. 516, 520 (2002) (“§ 1997e(a)’s exhaustion requirement applies to all prisoners  
25 seeking redress for prison circumstances or occurrences”). “[T]hat language is ‘mandatory’: An  
26 inmate ‘shall’ bring ‘no action’ (or said more conversationally, may not bring any action) absent  
27 exhaustion of available administrative remedies.” Ross v. Blake, 136 S. Ct. 1850, 1857 (2016)  
28 (quoting Woodford v. Ngo, 548 U.S. 81, 85 (2006); Jones v. Bock, 549 U.S. 199, 211 (2007)).

1 Dismissal for failure to state a claim is appropriate where “a failure to exhaust is clear on the face  
2 of the complaint.” Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014) (defendant may move for  
3 dismissal under Rule 12(b)(6) where exhaustion is clear on the face of the complaint); Davis v.  
4 Cal. Dep’t of Corr. and Rehab., 474 F. App’x 606, 607 (9th Cir. 2012) (district court properly  
5 dismissed case where it was clear on face of complaint that administrative remedies were not  
6 exhausted prior to filing). When the district court concludes that the prisoner has not exhausted  
7 administrative remedies on a claim, “the proper remedy is dismissal of the claim without  
8 prejudice.” Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (citation omitted), overruled  
9 on other grounds by Albino, 747 F.3d at 1168.

10 Plaintiff’s represents that he has not exhausted administrative remedies because he is not  
11 required to under the California Whistleblower’s Act. ECF No. 1 at 6, 12, 14. However, plaintiff  
12 is attempting to bring his claims under § 1983, and state law cannot relieve him of him of the  
13 obligation imposed by federal law to exhaust administrative remedies prior to filing a federal civil  
14 rights lawsuit. Accordingly, the complaint should be dismissed without prejudice. Plaintiff can  
15 bring his federal claims in a new action once he has exhausted his administrative remedies.

16 V. No Leave to Amend

17 In dismissing a complaint, leave to amend should be granted if it appears possible that the  
18 defects in the complaint could be corrected, especially if a plaintiff is pro se. Lopez v. Smith, 203  
19 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir.  
20 1995) (“A pro se litigant must be given leave to amend his or her complaint, and some notice of  
21 its deficiencies, unless it is absolutely clear that the deficiencies of the complaint could not be  
22 cured by amendment.” (citing Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987))). However,  
23 if, after careful consideration, it is clear that a complaint cannot be cured by amendment, the court  
24 may dismiss without leave to amend. Cato, 70 F.3d at 1005-06. Because amendment would not  
25 cure plaintiff’s failure to exhaust prior to initiating this lawsuit, leave to amend would be futile.  
26 The complaint should therefore be dismissed without leave to amend.

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1 VI. Plain Language Summary of this Order for a Pro Se Litigant

2 Your request to proceed in forma pauperis is granted and you are not required to pay the  
3 entire filing fee immediately.

4 It is being recommended that your case be dismissed without prejudice because you did  
5 not exhaust your administrative remedies before you filed the complaint. Once you exhaust your  
6 administrative remedies, you can bring your claims in a new complaint.

7 In accordance with the above, IT IS HEREBY ORDERED that:

8 1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 2) is granted.

9 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff  
10 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.  
11 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the  
12 Director of the California Department of Corrections and Rehabilitation filed concurrently  
13 herewith.

14 3. The Clerk of the Court shall randomly assign a United States District Judge to this  
15 action.

16 IT IS FURTHER RECOMMENDED that the case be dismissed without prejudice for  
17 failure to exhaust administrative remedies.

18 These findings and recommendations are submitted to the United States District Judge  
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days  
20 after being served with these findings and recommendations, any party may file written  
21 objections with the court and serve a copy on all parties. Such a document should be captioned  
22 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that  
23 failure to file objections within the specified time may waive the right to appeal the District  
24 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

25 DATED: July 27, 2020

26   
27 ALLISON CLAIRE  
28 UNITED STATES MAGISTRATE JUDGE